

## STATE CORPORATION COMMISSION

STATE OF VIRGINIA

AT RICHMOND, DECEMBER 6, 2004

COMMONWEALTH OF VIRGINIA, ex rel.

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STATE CORPORATION COMMISSION

CASE NO. PUE-2004-00068

Ex Parte: In the matter of establishing rules and regulations pursuant to the Virginia Electric Utility Restructuring Act for exemptions to minimum stay requirements and wires charges

ORDER INVITING COMMENTS

The Virginia Electric Utility Restructuring Act, Chapter 23, Title 56 of the Code of Virginia (§ 56-576 *et seq.*) ("the Act" or "Restructuring Act"), as amended by Chapter 827 of the 2004 Acts of the Assembly ("Senate Bill 651"), directs the State Corporation Commission ("Commission") to promulgate rules and regulations and to adopt certain market-based pricing methodologies in order to implement two new provisions of the Restructuring Act. These new statutory provisions relate to the minimum stay period adopted by the Commission pursuant to § 56-577 E 1 of the Act, and wires charges imposed pursuant to § 56-583 of the Act.

Under the Commission's Rules Governing Retail Access to Competitive Energy Services,<sup>1</sup> local distribution companies can require certain large industrial and commercial customers who return from a competitive service provider ("CSP") to capped rate service to remain a customer of the utility for a minimum stay period of 12 months.<sup>2</sup> Section 56-577 E 2 of the Act creates a statutory exemption to the minimum stay period and allows large commercial and industrial customers returning to a utility or default service provider to pay market-based costs for electric energy as an alternative to being bound by the 12-month minimum stay period.

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<sup>1</sup> 20 VAC 5-312-10 *et seq.*

<sup>2</sup> 20 VAC 5-312-80 Q.

Section 56-577 E 2 of the Act also directs the Commission to adopt a methodology for determining market-based costs for customers returning to the utility or default service provider, and § 56-577 E 4 further directs the Commission to adopt rules and regulations necessary to implement the new minimum stay exemption program.

Senate Bill 651 also creates a new statutory exemption program that allows certain customers to avoid paying wires charges when they switch to a CSP. Section 56-583 E 1 of the Act allows large industrial and commercial customers, and aggregated customers in all rate classes subject to demand criteria established by the Commission, to avoid paying wires charges when they switch to a CSP if the customers agree to pay market-based costs for electric energy if they return to an incumbent electric utility or default service provider. Section 56-583 E 3 of the Act further provides that the Commission shall establish a methodology to determine market-based costs for customers returning to a utility or default service provider, and § 56-583 E 4 directs the Commission to adopt rules and regulations necessary to implement the wires charges exemption program.

On June 16, 2004, the Commission entered an Order Establishing Proceeding that directed the Commission Staff to investigate the new minimum stay and wires charges exemption programs established by Senate Bill 651; provided public notice to interested persons and stakeholders of the Staff investigation; and directed the Commission Staff to form a work group for the purpose of assisting the Staff in developing a methodology for determining market-based costs and drafting proposed rules and regulations to implement the new exemption programs mandated by Senate Bill 651. The Commission's June 16, 2004, Order also invited interested persons and stakeholders to respond to a series of questions designed to develop the information necessary to implement the new programs. Finally, the Staff was directed to file a

report, after soliciting input from members of the work group, recommending an appropriate methodology for determining market-based costs, as well as proposed rules and regulations to implement the new programs.

On November 19, 2004, the Staff filed its report addressing the key issues identified by the Staff and work group relating to the implementation of the new exemption programs; making recommendations on the best way to resolve key issues identified by the Staff and members of the work group; and proposing rules and regulations to implement the minimum stay and wires charges exemption programs.

The Staff report notes that all members of the work group recognize that the limited duration of the new programs creates a critical time frame for the Commission to develop, approve, and implement the new exemption programs. Since the Restructuring Act requires the Commission to develop the rules and regulations to implement the programs and approve each utility's compliance plan before approving a methodology for determining market-based costs, the Staff and members of the work group recommend that the proposed rules and regulations and utility compliance plans be reviewed simultaneously by the Commission. The Staff and members of the work group recognize there is a risk of significant revisions to the proposed rules that may necessitate further revisions to the utility compliance plans. Nevertheless, the Staff and members of the work group believe that a parallel review of the proposed rules and regulations and the utility compliance plans represents the best way to proceed in order to implement the new exemption programs as soon as possible.

Another significant issue that arose during the work group meetings is whether the Act requires electric distribution cooperatives ("Cooperatives") to offer the new minimum stay and wires charges exemption programs to their members. The Cooperatives argue that the General

Assembly never intended the new programs to apply to them because the programs require local distribution companies to transfer their transmission assets to regional transmission entities ("RTEs") before any obligation to offer the programs arises. Since the Cooperatives have no transmission assets to transfer to RTEs, they argue a necessary "threshold condition precedent to application of the programs" does not exist for them.<sup>3</sup> The Cooperatives further argue that charging their members market-based costs and a reasonable margin upon their return to a Cooperative is inconsistent with their not-for-profit operations. Accordingly, the Cooperatives argue they should be allowed, but not be required to offer the new exemption programs to their members.

The Office of the Attorney General, Division of Consumer Counsel, filed a letter with the Commission on September 24, 2004, supporting the Cooperatives' position. The Division of Consumer Counsel's letter states that "in our view the provisions of §§ 56-577 E 2 and 56-283 of the Code of Virginia do not require cooperatives' participation in these programs."<sup>4</sup>

The Staff report notes that the statutory language creating the new programs is ambiguous concerning the applicability of the programs to the Cooperatives. The Staff therefore recommends that the proposed rules and regulations implementing the exemption programs not be applied to the Cooperatives until such time as the General Assembly makes it clear that the new exemption programs apply to them.

The Staff report also discusses the importance of educating consumers on the availability of the new exemption programs, particularly since participation in the wires charges exemption program will forever preclude customers from returning to capped rates -- a significant consumer

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<sup>3</sup> Letter posted at: [http://www.state.va.us/scc/division/eaf/comments\\_minimumstay.htm](http://www.state.va.us/scc/division/eaf/comments_minimumstay.htm)

<sup>4</sup> Ibid.

entitlement. The proposed rules therefore require utilities to provide written notice to each customer advising them of the availability of the new programs, as well as the attendant risks of participation.

The Staff report also addresses the anticipated costs that must be incurred by utilities to implement the new programs and what specific costs should be included in the methodology to determine market-based costs. The utilities are concerned that incurring significant costs to implement the programs, particularly if there is little or no customer participation, will place them at a disadvantage. Most utilities therefore believe that all implementation costs should be reflected in the market-based costs charged to customers when they return to a utility or default service provider.

The Staff, in contrast, opposes including all implementation costs in the market-based costs charged customers returning to a utility or default service provider. The Staff report notes that one obvious option that would reduce or eliminate totally all costs associated with the programs is for a utility to simply waive its current minimum stay requirement or wires charges and therefore not be required to implement these programs. Another alternative proposed by the Staff to reduce any unfavorable economic impacts is for utilities to develop manual work-around solutions to implement the programs, rather than extensive automated or computer intensive solutions, similar in concept to that accepted by the Commission regarding competitive supplier billing in Case No. PUE-2001-00297.<sup>5</sup>

The Staff report also addresses the eligibility of aggregated customers to participate in the wires charges exemption program. Section 56-583 E 1 of the Act allows aggregated customers

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<sup>5</sup> Commonwealth of Virginia, ex rel., State Corporation Commission, Ex Parte: In the matter of establishing rules and regulations pursuant to the Virginia Electric Utility Restructuring Act for consolidated billing services, 2002 Ann. Rept. 410.

from all rate classes, subject to demand criteria established by the Commission, to participate in the wires charges exemption program. The general consensus of the work group is that no threshold level of demand should be established for aggregated customers in order to encourage all customers to participate in the program. Subsequent to work group discussions, however, American Electric Power Company ("AEP") filed written comments recommending that a threshold of 500 kW be established as the minimum aggregated load to be eligible for participation in the wires charges exemption program. The Staff, in response, opposes establishing any threshold for aggregated customers to participate in the programs. The Staff report acknowledges AEP's position, but argues that the law states that the Commission "may" establish a threshold of demand for aggregated customers, not that the Commission "must" establish a threshold limit.

The Staff report also examines the limitation placed on the number of customers that can participate in the wires charges exemption program. Section 56-283 E 4 of the Act allows industrial, commercial, and aggregated customers to participate in the wires charges exemption program on a first-come, first-served basis until such time as the load associated with participating customers reaches 1,000 MW or eight percent of the utility's prior year adjusted peak load. Several members of the work group discussed the possibility of allocating the threshold load in a variety of ways to encourage more suppliers and customers to participate in the wires charges exemption program. While the Staff believes that the current statutory language allowing customers to participate in the program on a first-come, first-served basis may preclude allocating the threshold load in the manner discussed by the work group, the Staff indicates it would consider any such proposals included in a utility's compliance plan. However,

the Staff expressed no opinion on the legality of allocating load among customers in the manner suggested by several members of the work group.

Finally, the Staff report contains proposed rules and regulations designed to implement the new exemption programs. The report indicates that the Staff and members of the work group considered a series of definitions to include in the proposed rules, but eventually concluded their time was better spent discussing more significant issues given the tight time constraints imposed upon the Commission to implement the new programs. The Staff report submits, however, that the definitions contained in the Act itself, the existing Retail Access Rules, and in 20 VAC 5-312-40 of the proposed rules and regulations should be sufficient to implement the new programs.

The proposed rules and regulations also contain certain basic cost elements for utilities to consider when determining market-based costs and implementing the new programs. The Staff further states that the cost elements identified in the Staff report are not exclusive, but are presented merely as a framework for developing market-based costs in utility compliance plans. Staff recommends that the utility compliance plans identify all costs included in their proposed market-based costs to implement the programs, and should also describe such costs in sufficient detail to allow for an adequate review by the Staff and Commission.

NOW THE COMMISSION, having considered the Staff report and the proposed rules and regulations proposed therein, is of the opinion, and finds, that public notice of the Staff's report and the proposed rules and regulations therein should be provided to the public; that investor owned electric utilities should be required to file compliance plans and proposed market-based costs to implement the minimum stay and wires charges exemption programs; and that interested persons should be given the opportunity to file comments and requests for hearing

on the Staff's proposed rules and regulations and the compliance plans submitted by utilities to implement the new exemption programs.

As the Staff recognizes in its report, the limited duration of the programs creates a critical time frame to develop, approve, and implement the new exemption programs mandated by Senate Bill 651. The Act further requires the Commission to provide appropriate public notice and an opportunity for hearing before adopting any rules and regulations to implement the programs and before approving a methodology for determining market-based costs. Given the time constraints imposed in this case, we will provide for public notice of the rules as proposed by the Staff; require investor owned utilities to file their compliance plans to implement the new programs; and allow interested persons to file comments on the proposed rules and regulations and the utility compliance plans designed to implement the minimum stay and wires charges exemption programs.

We will not, however, require the Cooperatives to file compliance plans at this time. As indicated in the Staff report, one legal issue that was raised during the Staff's investigation is whether electric distribution cooperatives are subject to the new exemption programs. We find it appropriate to resolve this legal issue prior to requiring the Cooperatives to file any compliance plans. Accordingly, members of the work group and other interested persons will be allowed to file comments or briefs addressing this legal issue before we decide whether the Cooperatives must implement the new exemption programs.

In addition, given the limited duration of the new exemption programs and the tight time constraints imposed in this case, we encourage all interested persons to file their comments in writing. While this Order affords interested persons an opportunity to request a hearing in this matter, we encourage interested persons to resolve any factual disputes informally through



negotiation. A hearing will be scheduled only for good cause shown, and where the person requesting a hearing demonstrates that its comments or concerns cannot be addressed adequately in written comments.

Accordingly, IT IS ORDERED THAT:

(1) The Commission Staff shall promptly submit for publication in the *Virginia Register of Regulations* a copy of this Order and the rules and regulations as proposed by the Staff implementing the minimum stay and wires charges exemption programs.

(2) On or before January 10, 2005, each investor owned electric utility imposing a minimum stay period and/or wires charges shall file an original and fifteen (15) copies of a compliance plan containing proposed market-based costs to implement the new minimum stay and wires charges exemption programs with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. The compliance plans shall refer to Case No. PUE-2004-00068, and shall identify all costs included in the proposed market-based costs as well as an explanation of how each cost element falls within the definition of market-based costs contained in §§ 56-577 E 2 and 56-583 E 3 of the Restructuring Act.

(3) On or before February 7, 2005, interested persons may file written comments on the Staff report, the rules and regulations proposed by the Staff, and any utility compliance plans filed pursuant to Ordering paragraph (2) above. All written comments shall refer to Case No. PUE-2004-00068, and shall be filed in an original and fifteen (15) copies with the Clerk of the Commission at the address set forth in Ordering Paragraph (2) above. Interested persons desiring to submit comments electronically may do so by following the instructions found on the Commission's website: <http://www.state.va.us/scc/caseinfo.htm>.

(4) Interested persons desiring to file comments or briefs addressing the legal issue of whether electric distribution cooperatives must implement the new minimum stay and wires charge exemption programs may do so by filing, on or before February 7, 2005, an original and fifteen (15) copies of their comments or briefs with the Clerk of the Commission at the address set forth in Ordering Paragraph (2) and shall refer to Case No. PUE-2004-00068.

(5) On or before February 7, 2005, interested persons may request the Commission to convene a hearing on the rules and regulations proposed by the Staff or any utility compliance plans filed pursuant to Ordering Paragraph (2) above. Requests for hearing must be filed in writing, in an original and fifteen (15) copies, with the Clerk of the Commission at the address set forth in Ordering Paragraph (2) and shall refer to Case No. PUE-2004-00068. Requests for hearing shall also include: (i) a precise statement of the party's interest in the proceeding; (ii) a statement of the specific action sought to the extent then known; (iii) a statement of the legal basis for such action; and (iv) a precise statement why a hearing should be conducted in this matter.

(6) On or before February 7, 2005, persons desiring to participate as a Respondent addressing a utility's compliance plan shall file with the Clerk of the Commission at the address set forth in Ordering Paragraph (2) an original and fifteen (15) copies of a Notice of Participation as provided in the Commission's Rules of Practice and Procedure, 5 VAC 5-20-80, and shall refer to Case No. PUE-2004-00068. Respondents may request a hearing in their Notice of Participation by including a precise statement complying with the requirements of Ordering Paragraph (5) above.

(7) On or before February 21, 2005, the Commission Staff may file any response it has to the utility compliance plans and any comments filed in this case.

(8) On or before February 28, 2005, any utility filing a compliance plan and any Respondent may file a reply to any response filed by the Commission's Staff pursuant to Ordering Paragraph (7) above.

(9) On or before December 20, 2004, the Commission's Division of Information Resources shall publish the following notice as classified advertising in newspapers of general circulation throughout the Commonwealth of Virginia.

NOTICE TO THE PUBLIC OF A PROCEEDING TO  
ESTABLISH RULES AND REGULATIONS PURSUANT  
TO THE VIRGINIA ELECTRIC UTILITY RESTRUCTURING  
ACT FOR EXEMPTIONS TO MINIMUM STAY  
REQUIREMENTS AND WIRES CHARGES  
CASE NO. PUE-2004-00068

The Virginia Electric Restructuring Act (§ 56-576 *et seq.* of the Code of Virginia) ("the Act"), as amended this year by the General Assembly, directs the Virginia State Corporation Commission ("Commission") to promulgate certain rules and regulations to implement two new provisions of the Act. These new provisions relate to the 12-month minimum stay period adopted by the Commission pursuant to § 56-577 E 1 of the Act, and wires charges imposed pursuant to § 56-583 of the Act.

Under the Commission's Rules Governing Retail Access to Competitive Energy Services, an incumbent electric utility or default service provider can require certain large industrial and commercial customers who return from a competitive service provider ("CSP") to a utility or default service provider to remain a customer of the utility or default service provider for a minimum stay period of 12 months. Section 56-577 E 2 of the Act creates an exemption to the 12-month minimum stay period for those customers who return to a utility or default service provider if the customer agrees to pay market-based costs for electric energy. The Commission is further directed to adopt a methodology for determining market-based costs, and to adopt rules and regulations to implement this new statutory exemption program.

Section 56-583 E 1 of the Act creates a similar exemption program that will allow large industrial and commercial customers, and aggregated customers subject to demand criteria established by the Commission, to avoid paying wires charges when they switch

to a CSP if the customers agree to pay market-based costs for electric energy if they return to an incumbent electric utility or default service provider. The Commission is further directed to adopt a methodology for determining market-based costs, and to adopt rules and regulations to implement this new statutory exemption to wires charges.

Pursuant to an Order Establishing Proceeding entered by the Commission on June 16, 2004, the Staff of the State Corporation Commission filed a report and proposed rules and regulations to implement the new exemption programs mandated by the Act. By Order dated December 6, 2004, the Commission directed investor owned electric utilities to file, on or before January 10, 2005, compliance plans and proposed market-based costs to implement the new exemption programs.

Copies of the Commission's Orders and the Staff report are available for public review between the hours of 8:15 a.m. and 5:00 p.m., Monday through Friday, in the Commission's Document Control Center located on the first floor of the Tyler Building, 1300 East Main Street, Richmond, Virginia. Utility compliance plans to implement the new exemption programs will be available for public inspection on and after January 10, 2005. Copies of the Staff report and compliance plans may also be downloaded from the Commission's website: <http://www.state.va.us/scc/caseinfo.htm>.

On or before February 7, 2005, any person desiring to file comments on the Staff report, proposed rules and regulations, and utility compliance plans may do so by filing such comments with the Clerk of the Commission at the address set forth below. Interested persons desiring to submit comments electronically may do so by following the instructions found on the Commission's website: <http://www.state.va.us/scc/caseinfo.htm>.

Interested persons may also request a hearing on the proposed rules and regulations and any compliance plan filed by a utility by filing an original and fifteen (15) copies of the Request for Hearing on or before February 7, 2005. Requests for Hearing must include: (i) a precise statement of the interest of the filing party; (ii) a statement of the specific action sought to the extent then known; (iii) a statement of the legal basis for such action; and (iv) a precise statement why a hearing should be conducted in this matter.

On or before February 7, 2005, any person desiring to participate as a Respondent addressing a utility's compliance plan

shall file with the Clerk of the Commission at the address set forth below an original and fifteen (15) copies of a Notice of Participation as provided by the Commission's Rules of Practice and Procedure, 5 VAC 5-20-80. Respondents may request a hearing in their Notice of Participation by including a precise statement complying with the requirements set forth above for Requests for Hearing.

All written communications to the Commission shall be directed to the Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, and shall refer to Case No. PUE-2004-00068.

#### VIRGINIA STATE CORPORATION COMMISSION

(10) Within five (5) business days of the filing of this Order with the Clerk, the Commission Staff shall transmit electronically or mail copies of this Order to the interested persons and organizations that participated in the work group.

(11) On or before January 13, 2005, the Commission Staff shall file with the Clerk of the Commission proof of newspaper publication and proof of service required by Ordering Paragraphs (9) and (10).

(12) This matter shall be continued generally pending further Order of the Commission.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: the individuals listed on Appendix A attached hereto; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, 2nd Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Divisions of Economics and Finance, Energy Regulation, and Public Utility Accounting.